CONTENTS.

TABLE OF CASES.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No._____.

GENERAL SHALE PRODUCTS CORPORATION, - *Petitioner,*

v.

STRUCK CONSTRUCTION COMPANY, AND
SOUTHERN BRICK & TILE COMPANY, - *Respondents.*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The respondents respectfully submit that the prayer of the petitioner for the issuance of a Writ of Certiorari should not be granted.

PRELIMINARY STATEMENT.

In view of the suggestions in the brief in support of the Petition herein, that the Courts below have misunderstood the intent of its Bill of Complaint and its real cause of action, we think it will help the Court to quote verbatim from page 2 of Petitioner's brief in the

Circuit Court of Appeals, which states what it considered its cause of action and which also states the contents of the record:

> "On September 22, 1939, appellant, General Shale, filed its petition seeking damages against Struck and the Brick Company for an alleged violation of the Clayton Act, as amended by the Robinson-Patman Act (15 U. S. Code, Sec. 13). Specifically, the petition charges price discrimination by Struck and the Brick Company in the sale of brick to be used in a slum clearance project of the Housing Commission, to the damage of the appellant.
>
> "On December 30, 1939, both defendants filed answers (R. 4, 9).
>
> "On April 26, 1940, appellant took as if on cross-examination the deposition of M. P. Nicol, President of Struck (R. 15), and H. H. Bishop, Sales Manager of the Brick Company (R. 62).
>
> "On May 16, 1940, a pre-trial hearing was held before the District Court upon certain legal issues raised by the pleadings and the depositions (R. 14).
>
> "On March 6, 1941, the District Court entered a memorandum opinion upon the legal questions theretofore submitted on pre-trial hearing (R. 74).
>
> "On May 28, 1941, appellant moved for an extension of the pre-trial hearing (R. 83). On June 13th, the District Court entered a supplemental memorandum (R. 84) and on June 14th, appellant having declined to plead further the District Court entered an order dismissing the petition (R. 86).
>
> "Appellant appeals from the order dismissing its petition."

STATEMENT OF FACTS.

In 1934 the General Assembly of Kentucky enacted Chapter 113 of the Kentucky Statutes, authorizing cities of the first class to create a Municipal Housing Commission for the purpose of enabling the City, through said Commission, to clear "slum" areas, to improve the site and to erect thereon and maintain low cost houses in keeping with modern, sanitary, and safe methods.

The Act and Ordinance adopted thereunder by the City of Louisville were so adopted and enacted that the City could be entitled to the advantage of the provisions of Acts of Congress, extending to states and municipalities certain grants of money in furtherance of the purpose to better the standards of living by "slum clearance."

The Act was immediately challenged on many grounds and reached the Court of Appeals of Kentucky. In an exhaustive opinion, the Court held the Act constitutional in every respect (*Spahn* v. *Stewart,* 268 Ky. 97).

In its decision the Court held that the purpose of the Act was **public and governmental** and that therefore it was perfectly proper for the Act to exempt the bonds of the Louisville Municipal Housing Commission from taxation and to give it the power of condemning the necessary land for the purpose sought by the Act. The Court likewise held that there was no delegation of public or governmental power to the Commission, but that the only delegation was for the

purpose of carrying out the ministerial acts necessary to reach the end sought.

The Court of Appeals had occasion to again re-examine the constitutionality of the Act above referred to in a case between *Ira Webster, Tax Commissioner, Franklin County, Kentucky* v. *City of Frankfort Housing Commission,* where an attempt was made by Franklin County to tax the property of the City of Frankfort Housing Commission. An elaborate opinion was rendered by the Court on January 19, 1943, in line with its former opinion in *Spahn* v. *Stewart,* 268 Ky. 97. The Court of Appeals re-examined this case and a number of other cases of similar import decided by it and called attention to the fact that some forty state courts had reached the same conclusion that it had in the *Spahn Case.* The opinion particularly called attention to the fact that the City of Louisville Housing Commission was a

> *"public body carrying out a work of purely public nature and a governmental function,"*

and as a ministerial *alter ego* of the City of Louisville.

The case now sought to be brought to this Court involved a contract between the Struck Construction Company of Louisville and the City of Louisville Housing Commission, under a contract for a slum clearance project known as "Ky.-1-2." The contract was made in 1939 between the Struck Construction Company and the Commission, Struck being the successful bidder thereon. The advertisement for bids called for a lump

sum bid for the complete performance of three different things:

1. clearance of the site,
2. the erection of 59 buildings on the site, and
3. the improvement of the site.

The advertisements called for four alternates (Rec., p. 27, Ans. 122), which might affect the lump sum price of the base bid. In other words, if the alternate were adopted and would be cheaper for the contractor, the Commission would get a credit on the base bid or, if higher, the contractor would get a sum over the base bid. Only one of these alternates is in any way involved here. This alternate involves the character of the wall construction. The base bid provided for brick walls, with a back-up of hollow tile. Alternate No. 1 provided for the use of a clay product, known as "Speedbrik," which is a complete wall unit in itself and much larger than the ordinary face brick.

Petitioner's brief here (page 3) recognizes the dissimilarity between face brick and "Speedbrik." At page 3, after stating that "Speedbrik" is larger than standard size brick, petitioner's brief states:

> "As a consequence, not as many brick are required to cover the same area as with standard size brick, thereby giving a great labor saving advantage.* It is therefore readily apparent that it cannot be compared with standard size brick on a price per M. basis, although of course comparisons may be figured" * * *

*We will comment on the correctness of this first sentence later.

What the second sentence must, of course, mean is that there is no yard stick for comparison of cost, but that some one, with proper experience in building walls of the respective kinds of material and knowing the cost of handling and putting in place each kind of material, might make an estimate of the comparative cost of each in the finished wall. This again involves the ability and the experience and good judgment of the estimator. A slight mistake could be disastrous. Struck has already paid $5,000 for what it considered a mistake in estimating, without sufficient experience, the cost of laying "Speedbrik."

That "Speedbrik" and face brick were not of "like grade and quality" is also admitted by the parties to the contract, for it is treated in said contract as an alternate. While in a broad sense "Speedbrik" may have been in competition with face brick, it was no more so than stone, hollow tile, or any other character of wall construction, and certainly does not come within the term of "like grade and quality" as used in Sec. 13 of the Robinson-Patman Act. Its price per unit was in the small size twice what brick was and in a large unit about four times what brick was. This difference in size would make a large difference in the labor cost of getting the materials into the wall.

Indeed, the case here arises from the fact that Struck came to the conclusion that it had underestimated the cost of laying "Speedbrik" and that it would lose money on the job if the alternate were selected by the Commission and was therefore willing to make a

concession on the base bid to avoid having to put the "Speedbrik" in place.

Struck's bid for the entire work, known as the base bid, which covered face brick with hollow tile back-up, was $1,731,000.00 (Rec., p. 26, Ans. 114). Struck's *alternate* bid provided that if the Alternate Type of construction, *i. e.,* "Speedbrik" were selected by the Commission, the gross amount of the Struck bid would be reduced $13,000 (Rec., p. 28, Ans. 128, 129).

The contract gave the Commission the right at any time within sixty days after its acceptance of the bid to determine whether it would accept the base bid or the Alternate (Rec., p. 38, Ans. 209).

Sometime prior to the letting of the Slum Clearance Project here involved, the City had let "Ky. 1-1," which was known as the East End Project. This letting covered the same character of construction, that is, face brick with the tile back-up and the Alternate "Speedbrik." "Speedbrik" was used. Struck bid on that project, but did not secure the work (Rec., p. 34, Ans. 175).

Though having large experience in building structures with face brick and tile back-up and with the cost thereof, Struck had never at any time had any actual experience *in the cost of constructing* walls of Speedbrik. Their wide difference in character is demonstrated by their price. Speedbrik was quoted to Struck by petitioner at $36.50 for the small unit and $73.00 for the large unit, and was also quoted to Struck by the Pursell Company, of Cincinnati, Ohio (which company is not a party to this action), at $35.50 for the small unit and $71.00 per thousand for the large unit.

This last quotation was the one Struck used in making its bid on the "Speedbrik" alternate (Rec., p. 35, Ans. 185).

The cost of laying either the face brick or "Speedbrik" was a big element in the cost of the construction to the contractor. The cost of laying was more than the cost of the brick. Struck's experience had shown him it was necessary to use in his estimates the figure of $25.00 per thousand for laying brick (Rec., p. 29, Ans. 138), whereas the actual cost of the brick itself was only, in this case, $16.75 per thousand.

In order for Struck to have some idea of the cost of laying "Speedbrik," it had one of its men lay a sample panel and upon the result of this inadequate test made its bid.

After Struck had made its bid on the West End Project and before the Housing Commission had chosen between face brick and "Speedbrik," as the material to be used, work had progressed sufficiently on the East End Project, where "Speedbrik" was being used by another contractor, to enable Struck to check the cost of laying "Speedbrik" through observation and information, and in this way to more nearly check his estimate of the cost of laying "Speedbrik" used in bidding on the West End Project. Nicol explains the result of this and his reason for wishing to use face brick instead of "Speedbrik" as follows (1 Rec., pp. 45, 46):

> "259. What was your reason for that?
>
> A. In estimating the cost of the Speedbrik we used the methods that I have described heretofore and arrived, as well as we could, at what we

thought the cost of laying Speedbrik would be, but between the time that we bid on Kentucky 1-2 and the time we made these several offers to the Commission, they had started laying Speedbrik on the East End Housing Project and just as soon as they started laying brick there we watched the operation very closely and Mr. DeLeuil who had estimated the job checked the number of man hours and the number of pieces that they laid and several others of our organization watched the job and kept track of the production of the men and we had some conversation with both of the contractors about their experience with Speedbrik.

260. Who were the contractors?

A. The Whittenberg Construction Company and the George H. Rommel Company.

261. Do you remember who you discussed it with?

A. As I recall—

262. (Interrupting) With what officers of those companies?

A. I recall I personally talked to Mr. Whittenberg on one occasion about his experience with Speedbrik. From all of the information that we could secure from those different sources, on their experience with Speedbrik, **it appeared to us that we had made a mistake in the number of Speedbrik that could be laid and it appeared to us that our offer to deduct $13,000 on Alternate No. 1 would result in a loss to us.** We felt that we knew very accurately what the cost of the face brick and the hollow tile back-up was; we just had completed a large operation with that identical construction and that is more or less standard construction—we had lots of experience in that type work—we felt

sure of ourselves on the base bid and from the information we were able to get we felt shaky about our Speedbrik alternate and we were willing to reduce our base bid so as to make it possible for the Commission to decide on the base bid."

Nicol further states as follows (R. 53):

"327. And is there any other reason that caused you to agree to reduce your base bid?

A. None under the sun."

The advertisement for bids did not specify any particular character of face brick, or the price of the brick to be used.

The City was not buying brick.

The advertisement did, however, in order to give a basis for brick estimate, provide that the contractor should estimate his brick on the basis of $20.00 per thousand, with a subsequent increase or decrease in the base bid dependent on the price of the brick the City should select.

Following the award of the contract to Struck, Struck was directed by the City to have panels of face brick set up and secure the prices thereon (Rec., p. 39, Ans. 216). Prior to this time Struck had sought no brick quotations, nor had any been furnished to the City by him. After this direction from the City, Struck had panels set up and on June 9th (Rec., p. 39, Ans. 222) Struck sent the City a tabulation of these quotations. Two of the companies, Corbin Brick Company and W. G. Bush & Company, offered to furnish to Struck their brick at $16.75 per thousand. The

Southern Brick & Tile Company at the same time offered brick at $18.00 per thousand. Southern Brick & Tile Company is a Kentucky corporation and has its general offices in Jefferson County, Kentucky, where the City of Louisville is located. Two sellers of "Speedbrik," prior to Struck's making its bid, had given to Struck quotations of the price at which they would respectively sell "Speedbrik" to Struck. These two companies were the petitioner, General Shale, and The Pursell Company of Cincinnati (Rec., p. 35, Ans. 185). The quotation of The Pursell Company was **$2.00 per thousand lower** on the large "Speedbrik" unit and **$1.00 lower on the smaller "Speedbrik" unit** than that of the petitioner, General Shale.

On the same day, June 9th, that the Struck's letter was sent to the Commission with the quotations on the face brick, heretofore referred to, Mr. Murray P. Nicol, President of the Struck Company, in carrying out his purpose to attempt to have the Commission select face brick instead of the Alternate, had a talk with Mr. Dosker, Chairman of the Louisville Municipal Housing Commission, and offered to him and to one of the allied architects in charge of the job to reduce

> "our base bid price to the extent that it would be necessary to offset the difference between the base bid and Speedbrik."

(Rec., p. 41, Ans. 237). This offer was reported by Mr. Dosker to Mr. Sager, the Executive Director of the Commission, who thereupon called Mr. Nicol and told him that Mr. Dosker had reported his verbal offer

to reduce the base bid price, and further advised him that under the Commission's set-up and their method of administration that the best method to assure the accomplishing of what Nicol had proposed to Mr. Dosker was for Struck to reduce the price of the face brick to the extent that it was necessary to accomplish the reduction he had offered in the base bid. Acting upon this suggestion from Mr. Sager, Struck wrote to the architects and offered to furnish the brick at $14.09 per thousand (Rec., p. 42, Ans. 241), using Corbin brick or W. G. Bush & Company brick, which had been quoted at $16.75 per thousand in the letter of June 9th (R. 43, A. 244).

Mr. Nicol further testifies (Rec., p. 42, Ans. 241):

> "I wish to make it quite clear in this answer that the offer to furnish the brick at $14.09 per thousand was in order to carry out our offer to Mr. Dosker to reduce our base bid price."

After Struck had written the letter of June 10th, Mr. Nicol appeared before a meeting of the architects and the Commission and they informed him that they **had decided to accept Struck's offer as contained in its letter of June 10th,** but **they** wanted him to offer the business of supplying the face brick to the Southern Brick & Tile Company at a price of $16.75 per thousand (Rec., p. 50, Ans. 300), giving as their reason for so requesting that they would like

> "so far as possible, to see local products used in the construction of the building and for that reason they would like the Southern Brick & Tile Company to furnish the material" * * *

We wish to emphasize here that the bid was accepted on the $16.75 brick offer without regard to whether Southern Brick & Tile Company could offer its brick at the same price (Rec., p. 43, Ans. 246).

We call the Court's attention to the following statement on page 4 of petitioner's brief in support of his request for the Writ:

> "Before the Commission made a decision (R. 41), however, the respondent Struck approached the Housing Committee, verbally offering to reduce the price *if Southern Brick Company's brick were used,* by an amount necessary to offset the low bid of Speedbrik (R. 42)."

There is not a line of proof in the record to support the statement that Struck's offer to the Commission was dependent upon the use of Southern Brick & Tile brick. On the contrary, the affirmative testimony shows that Struck's offer to reduce his base bid price, if face brick were used, was made upon the basis of using Corbin Brick Company or W. G. Bush & Company brick—these companies having each previously bid $16.75 per thousand (Rec., p. 43, Ans. 244, 245, 246).

The morning after the Commission accepted Struck's offer, Struck telephoned Mr. Bishop, of the Southern Brick & Tile Company, and told Mr. Bishop of the action of the Commission and of its request that the contract be offered to him, if he could meet the price. Mr. Bishop, after considering the matter and discussing it with his dealers and taking into consideration the probability that he could get a reduced haul-

ing price and the saving in manufacture by reason of the quantity, accepted the business (Rec., p. 43, Ans. 246). Bishop also confirms the testimony of Nicol as to how the reduction came to be made in the Southern Brick & Tile price (Rec., p. 68, Ans. 74; also Rec., p. 69, Ans. 76; also Rec., p. 70, Ans. 86).

There is no evidence in any way contradicting it.

It should also be noted that the testimony shows that Struck did not inform Southern Brick & Tile of its offer to reduce its base bid on a $14.09 basis (Rec., p. 43, Ans. 248; Rec., p. 44, Ans. 249), and further that the Southern Brick & Tile did not know of it until after the suit was filed (Rec., p. 70, Ans. 89).

It must likewise be borne in mind that the idea of any combination between them is entirely negatived by the fact that Struck actually lost $5,000 by making the reduction in its bid and there is no evidence in the record in any way suggesting any reason why Struck would absorb a $5,000 loss for the benefit of the Southern Brick & Tile Company.

PETITIONER'S REASONS FOR ALLOWANCE OF WRIT.

Under the heading, "Reasons for allowance of writ," apparently two points are suggested by petitioner:

1. that the Circuit Court of Appeals was in error in holding that Struck did not make a sale of brick, *as such,* to the Commission;

and 2. that the District Court was in error in holding that sales to the City of Louisville Housing Commission were exempt from the penalties of the Robinson-Patman Act.

In regard to the second point, we need not now discuss its correctness, for that question is wholly immaterial if the judgment is otherwise right.

In regard to the first point, the conclusion of the petitioner, we submit, is entirely erroneous. The decision of the Circuit Court of Appeals was based upon the idea that the record affirmatively showed facts that took the case outside the Robinson-Patman Act, or conversely failed to show facts necessary to bring it within the terms of the Act. The Court held that there were no sales, such as are required by the Robinson-Patman Act, from which a comparison would show a differential in favor of one of its other customers, and also that Struck made no sale to the City of Louisville Housing Commission within the meaning of the Act. There was no holding, and no suggestion of a holding, that all construction contracts were *per se* excluded from the terms of the Sherman, or Clayton, or Robinson-Patman Act. Petitioner's fear that such would result from the affirmance of the judgment below is chimerical.

The effect of the affirmance would simply be that the Court held that under the facts of this case there was no discrimination within the meaning of the Robinson-Patman Act, or the Anti-Trust Act.

An examination of the opinion should demonstrate this.

Petitioner filed his Bill of Complaint, an Answer was made, and petitioner took two depositions, there were two sets of preliminary rulings by the Court, the petitioner thereafter refused to go further with the case and announced its intention to the Court, and the Bill was dismissed by the Court.

It is proper to call attention to the fact that the depositions were taken by the petitioner on April 26, 1940. The first preliminary opinion of the District Court was rendered March 6, 1941. Another request for submission was made by petitioner on May 28, 1941. A new ruling was had on June 13, 1941, and then the declination to plead further, with the consequent dismissal of the case.

The case was heard upon agreements that the testimony in the case should be considered along with the petitioner's pleadings, and the preliminary opinions of the lower Court and the opinion of the Circuit Court of Appeals showed that they did consider the testimony of the witnesses for the purpose of construing and applying the situation there presented to the statutory law.

If the petitioner had been dissatisfied with the testimony of the two witnesses, whose evidence was taken and used, it had from April 26, 1940, until June 13, 1941, in which to attempt to go forward with the case and take counter testimony in an attempt to sustain the cause of action that it was asserting. Instead of that, it elected a different course, with the result that its Bill was dismissed. That order entered June 14, 1941, is the one appealed from.

Under the repeated rulings of this Court, wherever the record will sustain the judgment, it will be affirmed on appeal without regard to how it was arrived at by the opinions below.

In *United States* v. *American Railway Express Co.*,[1] this Court said:

> * * * "But it is likewise settled that the appellee may, without taking a cross-appeal, urge in support of a decree any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it." * * *

Again, in *Morley Co.* v. *Maryland Casualty Co.*,[2] this Court said:

> * * * "Without a cross-appeal, an appellee may 'urge in support of a decree any matter appearing in the record although his argument may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it.'" * * *

The same ruling was followed in *Anderson, Receiver* v. *Atherton, Admr.*[3]

In *LeTulle* v. *Scofield*,[4] this Court said:

> "A respondent or appellee may urge any matter appearing in the record in support of a judgment," * * *

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[1] 265 U. S. 425, at p. 435.
[2] 300 U. S. 185, at p. 191.
[3] 302 U. S. 643.
[4] 308 U. S. 415, at p. 421.

There is no conflicting decision of a Circuit Court of Appeals cited against the decision of the Sixth Circuit.

There is no general federal question involved, because the Sixth Circuit decision was simply applying the facts of this case, which facts are probably *sui generis* to plain statements in the Robinson-Patman Act and such as have been supported in at least one other Circuit.

On the contrary, the case of *Shaw's Inc.* v. *Wilson-Jones Co.*,[1] is authority for the fact that there must be at least *two purchases* from the same seller with a differential between them on the same article of "like grade and quality."

None of petitioner's reasons for the allowance of the Writ come within this Court's Rule 38, which sets out as a guide conditions under which the Writ will be granted.

REASONS FOR DENYING THE WRIT.

Petitioner's Bill of Complaint sets out (Rec., pp. 2, 3) his cause of action against the respondents as follows:

> "(3) Plaintiff says that after the bids were submitted and the differential in favor of the plaintiff became apparent, the defendants entered into an agreement and a plan whereby the defendant, Southern Brick and Tile Company, so discriminated between the price for its materials furnished the defendant, Struck Construction Company, and other purchasers of its commodity,

[1] 105 F. (2d) 331.

which commodities are sold for use and consumption in commerce, so as to substantially lessen competition offered to the said defendant by other manufacturers, particularly the plaintiff herein, or that defendant, Struck Construction Company, re-sold to the Commission brick which it had purchased from the defendant, Struck Construction Company, at a price lower than that price at which brick was sold to other purchasers of such commodity so as to substantially lessen competition offered to the said defendant, particularly, by the plaintiff herein.

"Plaintiff says that one of the foregoing state of facts is true but that it does not know which is true. Plaintiff says that by reason of *one of the two state of facts, above set forth, and of the said price discrimination as accomplished thereby,* the differential existing in favor of the plaintiff was completely absorbed and the Commission selected face brick backed by hollow tile thereby destroying the competition offered by this plaintiff, and further destroying its opportunity to sell its product for use in the said project."

Petitioner in his brief in the Circuit Court of Appeals (p. 2) thus lucidly construes the character of its own claim against respondents:

"On September 22, 1939, appellant, General Shale, filed its petition seeking damages against Struck and the Brick Company for an alleged violation of the Clayton Act, as amended by the Robinson-Patman Act (15 U. S. Code, Sec. 13). Specifically, the petition charges price discrimination by Struck and the Brick Company in the sale of

brick to be used in a slum clearance project of the Housing Commission, to the damage of the appellant."

The case was briefed and argued by both sides upon the idea that this accurately stated the question and the Circuit Court of Appeals examined the case upon that idea.

There is no testimony in the record showing any agreement between respondents to affect competition, or any agreement between either of respondents or any one else showing an agreement to affect competition.

Incidentally, however, the Circuit Court of Appeal's decision negatives the idea that there was any conspiracy in this case.

1. The testimony in this case, which is uncontradicted and on which both Courts relied in making their respective decisions, was without contradiction and in determining whether the judgment dismissing was correct should be taken as determinative of the facts in this case.

The Circuit Court of Appeals' opinion shows a clear grasp of the salient facts in this case and is so clear in itself that we merely refer at this time to pages 92, *et seq.*, of that opinion, as stating our reasons why the case was rightly decided on the ground that there was no sale by Struck to the City of Louisville Housing Commission, and no liability on the part of the Brick Company.

2. Independently of the express decision of the Circuit Court of Appeals, the judgment is right

because the record does not show a necessary requisite of establishing a cause of action under Sec. 13 of the Robinson-Patman Act.* Sec. 13 of the Robinson-Patman Act deals with sales.

"It shall be unlawful * * * to discriminate in price between different **purchasers** of commodities of like grade and quality where either or any of the **purchases** involved in such discrimination are in commerce" * * *

The discrimination prevented is

"in **price** between **different purchasers** of commodities of like grade and quality where either or any of the **purchases involved** in such discrimination are in commerce."

In presenting the Bill to the Senate, Senator Logan made these statements from the Committee's analysis of the Bill:†

"The bill proposes to amend section 2 of the Clayton Act so as to suppress more effectually discriminations between **customers** of the **same seller** not supported by sound economic differences in their business position or in the cost of serving them."

Again (p. 358):

* * * "The purpose of the bill is to compel the treatment of all customers exactly alike when the same situation applies to all of them."

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*Section 13 is inserted in full in Appendix No. 1.
†See Wright Patman's book on the Robinson-Patman Act, page 283.

Wright Patman, the co-author of the Bill, in his book on the Bill, calls attention to the fact that the Bill is not concerned with competition in general (p. 51):

> "It is only concerned with such competition if the parties involved are distributing goods of *like grade and quality,* and then only if those parties in competition purchased such goods from *the same seller.*"

Again, he says (p. 52):

> "THE SECOND PRINCIPLE is, then that the Act applies only to those forms of competition engaged in, in connection with goods of like grade and quality having a *common origin,* or at some place along the line having experienced a *common ownership.*"

Again, he says (p. 52):

> * * * "Within the meaning and application of the Act, who are in competition? They must be **purchasers** of the same seller. They must be subject to injury if the seller favors one over the other."

Even differentials are not within the Act, which are occasioned by

> "differences in cost of manufacture, sale or delivery resulting from the differing methods or quantities in which such commodities are to such purchaser sold or delivered."

Struck did not sell brick at any time. It built buildings (Rec., p. 51, Ans. 308; Rec., p. 2, Ans. 312, 313). If we assume it did sell in this case, still no other sale by Struck is complained of, or proven, as of any time.

No two sales were alleged or proven as to the Brick Company of goods of a "like grade, or character, or in a like amount."

No showing was made either as to Struck, or as to the Brick Company that they at any time discriminated between two of their respective customers.

Not only does the Act and Patman's book sustain the above construction, but it was expressly held in *Shaw's Inc.* v. *Wilson-Jones Co.,* 105 F. (2d) 331.

In the absence of such showing, the judgment of the Circuit Court of Appeals, affirming the order of dismissal, must be right.

3. Whether Petitioner's suit be under the Sherman Act, the Clayton Act, or the Robinson-Patman Act, it was a requisite necessity that the claimant must show that he was injured in a financial way. *Jack* v. *Armour & Co.,* 291 Fed. 741, 745; *Twin Ports Oil Co.* v. *Pure Oil Co.,* 119 Fed. (2d) 747.

In this case the Petitioner assumes that it would have secured the business and thereby lost a profit upon it. The record affirmatively shows that this was not the case. On April 26, 1940, Nicol testified in answer to questions of Petitioner's counsel (Rec., p. 35, Ans. 185 and 186) that

Struck's bid on "Speedbrik" was based upon the quotation made by the Pursell Company, which was $2.00 lower on the large size and $1.00 lower on the small size of "Speedbrik" than the bid of General Shale, and also testified (Rec., p. 56):

> "Q. 352. If the Commission had ordered Speedbrik, had elected to take Speedbrik, would they have purchased it from the plaintiff in this case, or from Mr. Pursell?
>
> A. From Pursell; Pursell was the lower bidder on the brick."

The record showing affirmatively that General Shale would not have received the contract in any event, the judgment of dismissal was correct.

4. As to the Southern Brick & Tile Company, there are two additional reasons why the judgment as to it is correct. The only evidence in the case shows that it cut its price to meet an equally low price of two competitors, and also cut its price because of the quantity involved and agreement upon the part of its dealers to cut their commission, and the expected saving, which was obtained, in the hauling price on account of quantity.

5. Again, as to the Southern Brick & Tile Company, the judgment was right, because its making the price of $16.75 was not even the proximate cause of the use of face brick. The Commission had already agreed on the base bid prior to the time the Southern Brick & Tile Company bid was made, using either Corbin or Bush brick (Rec., p. 43, Ans. 246).

Although this testimony was given nearly a year and two months before the Petitioner declined to go forward with his case and although he had sought an additional hearing in the meantime, he made no attempt to amend his pleading, or to introduce evidence, in an attempt to disprove Nicol's statement of facts, but voluntarily left the record in the shape it was.

Respondents feel that the points heretofore made are so clear from this record and determinative of this case that it will not take up the Court's time here with re-arguing the question of

(1) whether any of these sales are within the purview of the Robinson-Patman Act because each was not in the course of commerce;

and (2) because each was made to a governmental authority,

although it is definitely thought that either is a good defense in this case.

Respectfully submitted,

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